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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–15a) is reported at 350 F. 2d 615. The opinion and order of the Federal Trade Commission (R. 42, 110, 112)[1] have not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1965. On October 25, 1965, Mr. Justice Clark entered an order extending the time for filing a petition for a writ of certiorari to and including December 13, 1965; on December 7, he entered an order granting a further extension to and including

[1] "R." refers to the joint record filed in the court below.

January 7, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission applied the correct standard in finding that petitioner's continued and systematic price discrimination, whereby some of its customers paid it as much as 6 percent more than others for the same goods, might, in the circumstances of this case, substantially lessen competition.

2. Whether the Commission's cease and desist order, by reason of its breadth and generality, exceeded the bounds of the Commission's discretion to fashion an appropriate remedy.

3. Whether the Commission was required to stay the cease and desist order in this case until it determined that United's two largest competitors were complying with outstanding cease and desist orders similar in terms to the one issued against United.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly, or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce * * * and where the effect of such discrimination may be

substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

Petitioner manufactures and sells "biscuit products" (crackers and cookies) throughout the United States (Pet. 57a).[1] Its operations are conducted through eight geographical subdivisions; the evidence in the Commission's proceeding largely concerned one of these, the Sawyer Division.[2] Between July 1, 1958, and June 30, 1959, the Sawyer Division offered retail grocers a graduated monthly discount on biscuit products ranging from 2 percent on a monthly purchase of $25 or more to a maximum 6-percent discount on a monthly purchase of $125 or more (Pet. 18a.).[3] In 1960, the Commission issued a complaint charging United with violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (Pet. 16a). The complaint alleged that United's discount plan resulted in price discrimination between purchasers of products of like grade and quality, and that the effect of such discrimination "may be substantially to lessen competition" among retail grocers (R. 8–9).

[1] The Sawyer Division covers Illinois and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan.

[2] This plan was replaced by another on July 1, 1959, under which the maximum discount was the same, but applied only to monthly purchases of $150 or more (Pet. 19a).

At the conclusion of Commission counsel's case, the hearing examiner granted United's motion to dismiss the complaint, holding that there had been no showing that United's discount plan had the anti-competitive effects specified in the statute (Pet. 27a–28a). The examiner's decision was reversed on appeal to the Commission. The Commission held that, in determining whether price discrimination may cause substantial injury to competition in the secondary line, the proper test is that of *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37: if some purchasers regularly pay substantially more for like goods than their competitors, a probability of substantial competitive injury may be inferred. Noting that the retail food business is highly competitive, that low net profits are prevalent, that retailers are anxious to take advantage of cash discounts, and that the price of merchandise is "a very important, if not the most important, factor in enabling them to compete" (Pet. 35a), the Commission found that, on the record before it, United's volume discounts, ranging up to 6 percent, appeared substantial, and that, unless rebutted, the evidence would be "sufficient to support an order against respondent to cease and desist the price discrimination practice charged" (Pet. 35a). On remand, petitioner offered no rebuttal evidence, and the hearing examiner found that it had violated Section 2(a) (Pet. 55a). The Commission affirmed, issuing a final order which provided (Pet. 68a) that United

> * * * in connection with the sale and distribution of their food products in commerce * * *

> do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products.

United petitioned the Court of Appeals for the Seventh Circuit to set aside the Commission's order. The court affirmed the Commission's order in its entirety. While noting that the dollar amount of the discrimination was relatively small (Pet. 8a), the court of appeals nonetheless agreed with the Commission that it was "substantial", and added that (Pet. 11a)

> even though price discriminations covering a single item in a grocery store may appear relatively insignificant when considered alone, they may assume the stature of substantiality when considered in the context of the store's total operation and as an incipient harm which would grow into reality if extended to all of the items handled by the grocer. * * *

The court also held that the Commission's cease and desist order was not unreasonably broad (Pet. 13a), and that the Commission had not abused its discretion in refusing to stay the effective date of the order until it determined whether petitioner's two largest competitors were complying with previously issued cease and desist orders similar in terms to the one issued against United (Pet. 14a).

ARGUMENT

1. The Commission held that an inference of probable substantial injury to "secondary-line" competition (*i.e.*, competition among customers of the seller charged with unlawful price discrimination) is warranted when some of the seller's customers are obliged on a continuing basis to pay substantially more for goods of like grade and quality than other competing customers (Pet. 34a). This is the plain teaching of *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, where, in sustaining the adequacy of the Commission's findings of competitive injury, this Court said, with specific reference to quantity discounts in the grocery industry (334 U.S. at 46–47):

> [T]he Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate.

In weighing substantiality, the Commission here carefully evaluated United's volume discount system in the light of the realities of competition in the retail grocery business. It found that that business is a highly competitive one, in which net profits are low, cash discounts and other allowances are important, and the cost of the merchandise to the retailer is a very important, if not the most important, factor in enabling him to remain competitive (Pet. 33a, 44a–45a). As the court below observed in rejecting United's attempt to attach a "*per se*" label to the Commission's action, "[a]ll the facts and circumstances of the case, including the amount of the dis-

counts, were considered by the Commission in reaching its conclusion" (Pet. 3a).

Petitioner contends (Pet. 16) that the Commission was required to make detailed findings concerning the manner in which competition in the resale of United's biscuit products might be impaired by its discrimination. This contention was properly rejected by the Commission (Pet. 33a) and the court of appeals (Pet. 7a). In *Morton Salt*—where the Commission had made an express finding that the amount of discrimination was so great as to affect the purchasers' resale price—this Court observed that the Commission had gone "much further in receiving evidence than the statute requires" (334 U.S. at 50):

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion * * *.

The court of appeals was also on sound ground in suggesting that the Commission might properly regard relatively small dollar amounts of discrimination in the sale of one item "as an incipient harm which could grow into reality if extended to all the items handled by the grocer" (Pet. 11a). It simply recognized the familiar rule that it is the Commission's and not the courts' function to determine

whether a particular form of price discrimination, considered in its industry setting, rises to the level of substantiality. See *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739. And, plainly, the price discriminations which United's small customers suffered month after month were not trivial or *de minimis*. The systematic and continuing character of United's discrimination distinguishes this case from *American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (C.A. 7), certiorari denied, 377 U.S. 954, where the same court of appeals found that price concessions given to retail gasoline dealers by their suppliers, but only during a seventeen-day gasoline "price war," could have had no more than a "temporary minimal impact on competition." 325 F. 2d at 106.

2. Contrary to petitioner's assertion (Pet. 23), the Commission's cease and desist order was not unreasonably broad. In sustaining it, the court below properly applied the principles of *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, and the cases cited therein. This Court has repeatedly recognized that the Commission's cease and desist orders need not be narrowly limited to a prohibition of the exact practice giving rise to the order; the Commission may also, by such orders, "prevent respondents from engaging in similarly illegal practices * * *." *Colgate-Palmolive*, *supra*, at 394–395; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. The Commission was warranted here in believing that an order forbidding any secondary-line price discrimina-

tion by United was appropriate since a narrower order might invite evasion.

The Commission's order is not inconsistent with this Court's admonition in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 367–368, that Commission orders be "clear and precise to avoid raising serious questions as to their meaning and application." The language of Section 2(a), which the Commission has employed in a number of other secondary-line price discrimination orders, is not inherently unclear or ambiguous, and, indeed, as a result of the many Commission and court decisions interpreting it, may have a more definite meaning than a novel formulation would. If there should arise situations in which petitioner is genuinely uncertain as to the applicability of the order, regular processes of the Commission are available for advice and guidance. See *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F. 2d 7 (C.A. 2), certiorari denied, 380 U.S. 955.

3. The court below declined to disturb the Commission's judgment that the order against United should become effective immediately and should not be stayed pending the Commission's final evaluation of compliance reports submitted by United's two major competitors. In so ruling, the court correctly applied *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411.

United's two competitors—National Biscuit Company and Sunshine Biscuit Company—are subject to cease and desist orders entered a number of years ago which are quite similar in terms to the order against

United.[4] To be sure, as United points out, since the orders against its competitors antedate the Finality Act of 1959, 73 Stat. 243, amending Clayton Act, Section 11, 15 U.S.C. 21, these companies, unlike United, would not be subject to civil penalties for violations of the orders until orders of enforcement were issued by a court of appeals. But these pre-Finality Act orders are not dead letters, without legal or moral effect. Neither the Commission nor the companies so regard them, as evidenced by the Commission's order to Sunshine and National to file supplemental reports of the manner of their compliance with the orders (R. 142), and by their prompt compliance. The Commission is currently considering these reports—a task complicated by the necessity of analyzing and investigating a very elaborate cost justification.

Thus, this is not a situation in which petitioner has been singled out for enforcement action while other important members of the industry engaging in similar practices are ignored. And any danger that petitioner might be competitively hurt by the self-enforcing character of the order the Commission entered against it has been largely eliminated by the Commission's notice to United (letter from the Secretary of the Commission, dated December 21, 1965, Appendix, *infra*, p. 13) that it will consider United's claim of competitive hardship when United files a compliance report as directed in the order; that it will act

[4] The cease and desist order originally entered against National Biscuit in 1944, 38 F.T.C. 218, was relatively narrow; it was modified and expanded in 1954, 50 F.T.C. 932. A cease and desist order similar to the 1954 order against National was entered against Sunshine Biscuit in 1955, 52 F.T.C. 110.

upon any request for relief "based on all the pertinent facts as then supplied by United and otherwise available to the Commission"; and that it will "not be disposed to" seek civil penalties with respect to any acts or practices undertaken by United in the interim.

In the circumstances, the court of appeals was correct in holding that there was no "patent abuse of discretion" by the Commission. As this Court said in the *Moog* case, *supra* (355 U.S. at 413):

> It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

Petitioner asserts (Pet. 29–30), however, that the court of appeals' determination on this point is in conflict with the decision of another panel of the same court in *Universal-Rundle Corp.* v. *Federal Trade Commission*, 352 F. 2d 831, where it was held that the Commission had committed a patent abuse of discretion in issuing a final cease and desist order against Universal-Rundle before initiating proceedings against its principal competitors. Whether or not *Universal-Rundle* was correctly decided,* we note that in the

*The Solicitor General has not yet determined whether to file a petition for certiorari in that case.

present case cease and desist orders have already been issued against United's principal competitors and the Commission is actively considering the status of their compliance with those orders.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1966.

APPENDIX

DECEMBER 21, 1965.

WILLIAM SIMON, Esq.,
Howrey, Simon, Baker & Murchison,
1707 H Street NW.,
Washington, D.C., 20006.

DEAR MR. SIMON: This is in response to your letter of November 26, 1965, in which you make application on behalf of the United Biscuit Company of America for a stay in the effective date of the order issued against United in Docket No. 7817 until such time as the competitors of United, National Biscuit Company and Sunshine Biscuits, Inc., are in compliance with the orders issued against them. You state that in return United will withdraw its petition for certiorari.

The Commission will not enter into the arrangement which you suggest and stay the effective date of the order to cease and desist issued against United in Docket No. 7817. The Commission will consider respondent United's claim of competitive hardship if it is made at the time United files its compliance report under a final order to cease and desist, and the Commission's determination in response to a request for relief would, at that time, be based on all the pertinent facts as then supplied by United and otherwise available to the Commission. Pending such determination by the Commission, the Commission would not be disposed to initiate a civil penalty proceeding for acts and practices undertaken by United in complying with the order.

By the Commission:

(S) Joseph W. Shea,
JOSEPH W. SHEA,
Secretary.

cc: Roland D. Whitman, Esq., Ross, Hardies, O'Keefe, Babcock, McDugald & Parsons, 122 South Michigan Avenue, Chicago, Illinois, 60603.

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